Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

GUANG QIU LI,

Petitioner,

v.

CONRAD AGAGAN
Detention & Deportation Supervisor, United States Immigration and Customs Enforcement, Laredo, TX

GRACE WINFREY
Interim Field Operations Director, Detention and Removal Operations, United States Immigration and Customs Enforcement, San Antonio, TX

MICHAEL CHERTOFF
Secretary of Homeland Security

ALBERTO R. GONZALEZ
U.S. Attorney General

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review:

1. Whether Petitioner 5th and 14th Amendment Rights were violated when Petitioner's application for adjustment of status under 8 C.F.R. 245.10 (or commonly known as 245(i) benefit) was never adjudicated since August 19, 1999.

2. Whether Petitioner has the right for mandamus or affirmative relief under 28 U.S.C. Section 1361 to require the United States Citizenship and Immigration Service to act upon an application of adjustment of status based upon an approved, or approvable when filed, by a United States Citizen spousal petition.

3. Whether 8 C.F.R. 245.10 benefits extend only to an alien-Petitioner who was ordered deported by immigration court to seek to "reopen" his deportation order which has already barred by 90-days statutory time limit.

4. Whether 8 C.F.R. 245.10 benefits extend to alien-Petitioner who was given voluntarily departure by the Service but violated the statute by remaining in United States after the time limit.

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JURISDICTION

The Honorable U.S. Supreme Court has jurisdiction pursuant to 28 U.S.C. § 2101(e) & 28 U.S.C. § 1291

CONSTITUTION AND LAWS

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment XIV]

Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sec. 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(c) Motion to reopen. (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in Sec. 1001.1(p) of this

chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

§245.10 Adjustment of status upon payment of additional sum under section 245(i).

(a) *Definitions.* As used in this section the term:

(1)(i) *Grandfathered alien* means an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or

(B) An application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed.

(ii) If the qualifying visa petition or application for labor certification was filed after January 14, 1998, the alien must have been physically present in the United States on December 21, 2000. This requirement does not apply with respect to a spouse or child accompanying or following to join a principal alien who is a grandfathered alien as described in this section.

(2) *Properly filed* means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on

or before April 30, 2001, and accepted for filing as provided in §103.2(a)(1) and (a)(2) of this chapter; and
(ii) With respect to a qualifying application for labor certification, that the application was properly filed and accepted pursuant to the regulations of the Secretary of Labor, 20 CFR 656.21.
(3) *Approvable when filed* means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application for adjustment of status under section 245(i) of the Act.
(4) *Circumstances that have arisen after the time of filing* means circumstances similar to those outlined in §205.1(a)(3)(i) or (a)(3)(ii) of this chapter.
(b) *Eligibility.* An alien who is included in the categories of restricted aliens under §245.1(b) and meets the definition of a "grandfathered alien" may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs (b)(1) through (b)(7) of this section:
(1) Is physically present in the United States;

(2) Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;
(3) Is not inadmissible from the United States under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;
(4) Properly files Form I–485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the required fee for that application;
(5) Properly files Supplement A to Form I–485 on or after October 1, 1994;
(6) Pays an additional sum of $1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and
(7) Will adjust status under section 245 of the Act to that of lawful permanent resident of the United States on or after October 1, 1994.
(c) *Payment of additional sum.* An adjustment applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment application filing fee as specified in §103.7(b)(1) of this chapter. Each application submitted under the provisions of section 245(i) of the Act must be submitted with an additional sum of $1,000. An applicant must submit the additional sum of $1,000 only once per application for adjustment of status submitted under the provisions of section 245(i) of the Act. However, an applicant filing under the provisions of section 245(i) of the Act is not required to pay the additional sum if, at the time the application for adjustment of status is filed, the alien is:
(1) Unmarried and less than 17 years of age;
(2) The spouse of a legalized alien, qualifies for and has properly filed Form I–817, Application for Voluntary

Departure under the Family Unity Program, and submits a copy of his or her receipt or approval notice for filing Form I–817; or

(3) The child of a legalized alien is unmarried and less than 21 years of age, qualifies for and has filed Form I–817, and submits a copy of his or her receipt or approval notice for filing Form I–817. Such an alien must pay the additional sum if he or she has reached the age of 21 years at the time of filing for adjustment of status. Such an alien must meet all other conditions for adjustment of status contained in the Act and in this chapter.

(d) *Pending adjustment application with the Service or Executive Office for Immigration Review filed without Supplement A to Form I–485 and additional sum.* An alien who filed an adjustment of status application with the Service in accordance with §103.2 of this chapter will be allowed the opportunity to amend such an application to request consideration under the provisions of section 245(i) of the Act, if it appears that the alien is not otherwise ineligible for adjustment of status. The Service shall notify the applicant in writing of the Service's intent to deny the adjustment of status application, and any other requests for benefits that derive from the adjustment application, unless Supplement A to Form I–485 and any required additional sum is filed within 30 days of the date of the notice. If the application for adjustment of status is pending before the Executive Office for Immigration Review (EOIR), EOIR will allow the respondent an opportunity to amend an adjustment of status application filed in accordance with §103.2 of this chapter (to include Supplement A to Form I–485 and proof of remittance to the INS of the required additional sum) in order to request consideration under the provisions of section 245(i) of the Act.

(e) *Applications for Adjustment of Status filed before October 1, 1994.* The provisions of section 245(i) of the Act shall not apply to an application for adjustment of status that was filed before October 1, 1994. The provisions of section 245(i) of the Act also shall not apply to a motion to reopen or reconsider an application for adjustment of status if the application for adjustment of status was filed before October 1, 1994. An applicant whose pre-October 1, 1994, application for adjustment of status has been denied may file a new application for adjustment of status pursuant to section 245(i) of the Act on or after October 1, 1994, provided that such new application is accompanied by: the required fee; Supplement A to Form I–485; the additional sum required by section 245(i) of the Act; and all other required initial and additional evidence.

(f) *Effect of section 245(i) on completed adjustment applications before the Service.* (1) Any motion to reopen or reconsider before the Service alleging availability of section 245(i) of the Act must be filed in accordance with §103.5 of this chapter. If said motion to reopen with the Service is granted, the alien must remit to the Service Supplement A to Form I–485 and the additional sum required by section 245(i) of the Act. If the alien had previously remitted Supplement A to Form I–485 and the additional sum with the application which is the subject of the motion to reopen, then no additional sum need be remitted upon such reopening.

(2) An alien whose adjustment application was adjudicated and denied by the Service because of ineligibility under section 245(a) or (c) of the Act and now alleges eligibility due to the availability of section 245(i) of the Act may file a new application for adjustment of status pursuant to section 245(i) of the Act, provided that such new

application is accompanied by the required fee for the application, Supplement A to Form I–485, additional sum required by section 245(i) of the Act and all other required and additional evidence.

(g) *Aliens deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status.* Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act, deportable. Under section 245(c)(6) of the Act, persons who are deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status under section 245(a) of the Act. Any person who is deportable under section 237(a)(4)(B) of the Act is also ineligible to adjust status under section 245(i) of the Act.

(h) *Asylum or diversity immigrant visa applications.* An asylum application, diversity visa lottery application, or diversity visa lottery-winning letter does not serve to grandfather the alien for purposes of section 245(i) of the Act. However, an otherwise grandfathered alien may use winning a diversity visa as a basis for adjustment.

(i) *Denial, withdrawal, or revocation of the approval of a visa petition or application for labor certification.* The denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien's family members) from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate.

(j) *Substitution of a beneficiary on an application for a labor certification.* Only the alien who was the beneficiary of the application for the labor certification on or before April 30, 2001, will be considered to have been grandfathered for purposes of filing an application for adjustment of status under section 245(i) of the Act. An alien who was previously the beneficiary of the application for the labor certification but was subsequently replaced by another alien on or before April 30, 2001, will not be considered to be a grandfathered alien. An alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien.

(k) *Changes in employment.* An applicant for adjustment under section 245(i) of the Act who is adjusting status through an employment-based category is not required to work for the petitioner who filed the petition that grandfathered the alien, unless he or she is seeking adjustment based on employment for that same petitioner.

(l) *Effects of grandfathering on an alien's nonimmigrant status* . An alien's nonimmigrant status is not affected by the fact that he or she is a grandfathered alien. Lawful immigration status for a nonimmigrant is defined in §245.1(d)(1)(ii).

(m) *Effect of grandfathering on unlawful presence under section 212(a)(9)(B) and (c) of the Act.* If the alien is not in a period of stay authorized by the Attorney General, the fact that he or she is a grandfathered alien does not prevent the alien from accruing unlawful presence under section 212(a)(9)(B) and (C) of the Act.

(n) *Evidentiary requirement to demonstrate physical presence on December 21, 2000.* (1) Unless the qualifying immigrant visa petition or application for labor certification

was filed on or before January 14, 1998, a principal grandfathered alien must establish that he or she was physically present in the United States on December 21, 2000, to be eligible to apply to adjust status under section 245(i) of the Act. If no one document establishes the alien's physical presence on December 21, 2000, he or she may submit several documents establishing his or her physical presence in the United States prior to, and after December 21, 2000.

(2) To demonstrate physical presence on December 21, 2000, the alien may submit Service documentation. Examples of acceptable Service documentation include, but are not limited to:

(i) A photocopy of the Form I–94, Arrival-Departure Record, issued upon the alien's arrival in the United States;

(ii) A photocopy of the Form I–862, Notice to Appear;

(iii) A photocopy of the Form I–122, Notice to Applicant for Admission Detained for Hearing before Immigration Judge, issued by the Service on or prior to December 21, 2000, placing the applicant in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997);

(iv) A photocopy of the Form I–221, Order to Show Cause, issued by the Service on or prior to December 21, 2000, placing the applicant in deportation proceedings under section 242 or 242A of the Act (as in effect prior to April 1, 1997);

(v) A photocopy of any application or petition for a benefit under the Act filed by or on behalf of the applicant on or prior to December 21, 2000, which establishes his or her presence in the United States, or a fee receipt issued by the Service for such application or petition.

(3) To demonstrate physical presence on December 21, 2000, the alien may submit other government

documentation. Other government documentation issued by a Federal, state, or local authority must bear the signature, seal, or other authenticating instrument of such authority (if the document normally bears such instrument), be dated at the time of issuance, and bear a date of issuance not later than December 21, 2000. For this purpose, the term Federal, state, or local authority includes any governmental, educational, or administrative function operated by Federal, state, county, or municipal officials. Examples of such other documentation include, but are not limited to:

(i) A state driver's license;

(ii) A state identification card;

(iii) A county or municipal hospital record;

(iv) A public college or public school transcript;

(v) Income tax records;

(vi) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, shows that the applicant was present in the United States at the time, and establishes that the applicant sought on his or her own behalf, or some other party sought on the applicant's behalf, a benefit from the Federal, state, or local governmental agency keeping such record;

(vii) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, that shows that the applicant was present in the United States at the time, and establishes that the applicant submitted an income tax return, property tax payment, or similar submission or payment to the Federal, state, or local governmental agency keeping such record;

(viii) A transcript from a private or religious school that is registered with, or approved or licensed by, appropriate State or local authorities, accredited by the State or regional

accrediting body, or by the appropriate private school association, or maintains enrollment records in accordance with State or local requirements or standards.

(4) To demonstrate physical presence on December 21, 2000, the alien may submit non-government documentation. Examples of documentation establishing physical presence on December 21, 2000, may include, but are not limited to:

(i) School records;

(ii) Rental receipts;

(iii) Utility bill receipts;

(iv) Any other dated receipts;

(v) Personal checks written by the applicant bearing a bank cancellation stamp;

(vi) Employment records, including pay stubs;

(vii) Credit card statements showing the dates of purchase, payment, or other transaction;

(viii) Certified copies of records maintained by organizations chartered by the Federal or State government, such as public utilities, accredited private and religious schools, and banks;

(ix) If the applicant established that a family unit was in existence and cohabiting in the United States, documents evidencing the presence of another member of the same family unit; and

(x) For applicants who have ongoing correspondence or other interaction with the Service, a list of the types and dates of such correspondence or other contact that the applicant knows to be contained or reflected in Service records.

(5)(i) The adjudicator will evaluate all evidence on a case-by-case basis and will not accept a personal affidavit attesting to physical presence on December 21, 2000,

without requiring an interview or additional evidence to validate the affidavit.

(ii) In all cases, any doubts as to the existence, authenticity, veracity, or accuracy of the documentation shall be resolved by the official government record, with records of the Service and the Executive Office for Immigration Review (EOIR) having precedence over the records of other agencies. Furthermore, determinations as to the weight to be given any particular document or item of evidence shall be solely within the discretion of the adjudicating authority (i.e., the Service or EOIR). It shall be the responsibility of the applicant to obtain and submit copies of the records of any other government agency that the applicant desires to be considered in support of his or her application.

[59 FR 51095, Oct. 7, 1994; 59 FR 53020, Oct. 20, 1994, as amended at 62 FR 10384, Mar. 6, 1997; 62 FR 39424, July 23, 1997; 62 FR 55153, Oct. 23, 1997; 66 FR 16388, Mar. 26, 2001]

STATEMENT OF FACTS

Petitioner is a Chinese National, born in 1961, Married with a United States Citizen wife and has two children, age 5 and age 2. Petitioner is residing in Midland/Odessa, Texas and operating a Chinese Restaurant.

Petitioner entered the United States on December 5, 1989. In 1996, he notified the Government of his illegal presence in the United States and applied for political asylum benefit. He was then placed on deportation proceedings before the Immigration Court in New York City. Petitioner's asylum was based on his reasonable fear of persecution for his pro-democracy political activities and under the forced family planning policy of his native country, China. However, his prior counsel withdrew the application on August 26, 1997 instead he induced Petitioner in accepting the Immigration Court's grant of voluntary departure.

Petitioner received a grant until April 26, 1998 to voluntarily depart United States or he would be deported alternatively if he did not depart by that date. On January 15, 1998, prior to his granted of voluntary departure date, Petitioner married Ms. Chui Fong Chan, who was a permanent resident of the United States at that time. On March 5, 1998, Petitioner's wife filed a Petition for Alien Relative in favor of Petitioner. Petitioner requested an extension of his voluntary departure date, but the District Director denied it in April 21, 1998. See Appendix "A". Petitioner did not depart the Untied States by the scheduled departure date of April 26, 1998. Accordingly, the Immigration Court's alternative order of deportation was confirmed. Petitioner's wife became a United States

citizen on November 8, 1998. Her Alien Relative Petition for Petitioner was approved on January 27, 1999. See Appendix "B".

Petitioner moved to reopen his deportation proceedings sometime in 1997 or 1998. This motion was denied as untimely pursuant to 8 CFR § 3.23(b)(1). On August 19, 1999, Petitioner filed an application to adjust is status to that of a Lawful Permanent Resident. As no quota applied to him, Petitioner was immediately eligible to adjust his status at that time. Petitioner filed a second motion to reopen with the Immigration Court in New York and requested adjustment of status under Immigration and Nationality Act section 245(i) based on his genuine marriage to a United States citizen. The Immigration Court again denied Petitioner's motion to reopen on September 17, 1999. See Appendix "C".

Petitioner was apprehended and detained by the Immigration Service in December of 2003 during a sweep of one of his family's restaurants. Petitioner requested a stay of deportation administratively, but it was denied by Immigration Officer Grace Winfrey on February 9, 2004. While Petitioner was detained, Petitioner sought relief in the District Court to enjoin his deportation. His release into the community was supported by letters from his community and friends. Petitioner finally was released by Service on March 11, 2005 and places him under Service supervision.

Additionally, Petitioner asked the lower Courts to order the Immigration Service to adjudicate an application for adjustment of his immigration status – an application that had been pending for over six years now when the processing time is normally about two years. Petitioner asked the 5th Circuit Court to use its mandamus power to

order the Immigration Service to adjudicate Petitioner's section 245(i) application. Petitioner is entitled to adjust his status because of his bona fide marriage to a United States citizen. 5th Circuit Court denied Petitioner's petition of Review. See Appendix "E"

THE ARGUMENT

I. Whether Petitioner 5th and 14th Amendment Rights were violated when Petitioner's application for adjustment of status under 8 C.F.R. 245.10 (or commonly known as 245(i) benefit) was never adjudicated since August 19, 1999 or alternatively,

II. Whether 8 C.F.R. 245.10 benefits extend only to an alien-Petitioner who has never been ordered deported or removed by immigration court or violated the voluntarily departure status.

The Honorable 5th Circuit, citing the congressional intent about the passing of the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), 110 Stat. 3009-546 (1996) in 1996, substantially limits judicial review of the Attorney General's immigration decisions. The 5th Circuit, citing the U.S. Supreme Court Case of *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) supports its finding to deny review. Further, citing the Supreme Court decision on Reno, explained that § 1252(g) was not a general bar on jurisdiction, but rather limited judicial review to a narrow class of discretionary executive.

The 5th Circuit further ruled that "an alien who is in deportation or removal proceedings shall have his application for adjustment of status considered only in those proceedings. 8 C.F.R § 245.2(a)(1)." The 5th Circuit, states that "[t]he [Legal Immigration and Family Equity] LIFE Act Amendments contain no special provisions for reopening cases under Section 245(i) of the Act (8 U.S.C. 1255(i))

where an alien already is the subject of a final order of removal, deportation or exclusion." 66 F.R. 16383 at 16386. Hence, motions to reopen based on Section 245(i) are governed by the Department of Justice's rules which contain time and numerical limitations on the filing of such motions. *See 8* C.F.R. §§ 3.23(b) (1) and 3.2(c) (2) (now codified at 8 C.F.R. §§ 1003.23 and 1003.2)."

5th Circuit, citing its own ruling that *Cardoso v. Reno,* 216 F.3d 512 (5th Cir. 2000) "we affirmed the district court's application of § 1252(g) to dismiss aliens' requests to compel the Attorney General to adjust their immigration status, permit them to remain in the United States, and provide them with work authorization. *Id.* at 513." The Court concludes "Therefore, this Court reasoned that if the plaintiffs had been successful, permitting "such challenges would `lead to the deconstruction, fragmentation,' and hence prolongation of removal proceedings at which the Supreme Court concluded that § 1252(g) is directed.'" *Id.* (*Alvidres*-Reyes v. Reno, 180 F.3d 199, 205 (5th Cir. 1999)." Although the 5th circuit realizes that the plaintiffs in *Cardoso* had been denied adjustments of status, and Petitioner's application has never been adjudicated, nonetheless, the Court proceeds it makes no different in reaching its decision.

5th Circuit, in reaching its decision, stated "there is a final order of deportation", then ASSUMES "his only avenue for adjustment of status was by reopening his proceedings". Since the Immigration Judges have denied two of his motions to reopen., therefore Petitioner's adjustment of status has not been adjudicated. The April 26, 1998 order of removal entered against Petitioner has not been vacated. As the 5th Circuit

concludes, "...Even if Petitioner couches his claim as a request for adjustment of status, he is actually seeking review of the decision to execute a removal order against him. Hence, 8 U.S.C. § 1252(g) precludes jurisdiction." When Congress passed 8C.F.R.245.10 as to the Grandfathered aliens also known as 245(i) Act, it intends to allow those who have been in illegal immigration status, disregard whether one entered the United States with or without inspection; disregard whether one may violate their status or not by accepting unauthorized employment; disregard whether one has overstayed their status of not to apply for adjustment of status. In other words, disregard their reasons of presence in United States, and as long as they have not committed any act which cause them to be inadmissible, they are allowed to adjustment their status in United States by paying a $1,000 penalty. See 8 C.F.R. 245.10. Although the Act makes no provision about whether those have been order removed or deported like the Petitioner at bar should be included. It does not automatically exclude this class of aliens to become eligible without a proper justification. Neither the Service nor the 5th Circuit provides any justification in making a distinction between the class of aliens who are eligible for 245(i) benefit even they entered illegally into United States from the class of aliens who remain in United States but with a deportation order, provided all other factors remain the same. In fact, the Service has been adjudicating aliens who have been ordered deported or removed such as the Petitioner without requiring them to seek reopening the case before the immigration court in order to qualify for adjustment of status. The Service will not deny it in their common practice, including true experience of the undersigned counsel with some of his other clients. It is

therefore a violation of the 14th amendment right of equal protection clause to treat one class of aliens differently from another class of alien without proper justification. In fact, hundreds of thousands of aliens who are now have deportation orders are seeking this Court to provide guidance as to arbitrariness of the interpretation about 245(i) benefit applicability to person such as the Petitioner.

As such, the 5th Circuit has assumed since the Service never adjudicated the pending application, therefore, the Court concluded the application was not approvable and therefore no obligation to act upon the application for adjustment of status filed. This ruling is simply wrong and arbitrary. The Court, in one hand, defers much of the decision making about immigration related matters to the Service, but on the other hand, assumed a certain decision which is not made by the Service yet. The Service, no matter what the reason to refuse the application, owes the Petitioner the duty to adjudicate the pending application and a clear explanation why the Petitioner does not qualify the 245(i) benefit. This duty is breached.

III. Whether Petitioner has the right for mandamus or affirmative relief under 28 U.S.C. Section 1361 to require the United States Citizenship and Immigration Service to act upon an application of adjustment of status based upon an approved, or approvable when filed, by a United States Citizen spousal petition.

The Honorable 5th circuit states "Mandamus Act, 28 U.S.C. § 1361, is "whether mandamus would be an appropriate means of relief." Citing *Jones v. Alexander, 609* F.2d 778, 781 (5th Cir. 1980). "Three elements must exist before mandamus can

issue: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available." *Id.*

Thus, a court may require an agency to take action upon a matter, without directing how it shall act. The fact that Immigration Service has discretion in the ultimate decision whether to grant LPR status is simply irrelevant to the question of whether it has discretion to refuse to act on Petitioner's application. *See Mt. Emmons Mining,* 117 F.3d at 1172; *Atlantic & Gulf Stevedores, Inc. v. Donovan,* 274 F.2d 794, 798 (5th Cir. 1960); *Mastrapasqua v. Shaughnessy,* 180 F.2d 999, 1002 (2d Cir.1950); *Dabone v. Thornburgh,* 734 F. Supp. 195, 200 (E.D.Pa.1990). In the case at bar the Courts apparently was confusing the discretion of the Attorney General over how it resolves Petitioner's application with its discretion over whether it has actually resolved it. *Dabone,* 734 F. Supp. at 200.

Since the Court has ruled, the Petitioner has not acquired the right to have the benefit of 245(i) by failing to have the deportation order reopen, the mandamus action is inappropriate. Although the Court has realized that the application has never been adjudicated, it doesn't matter anyway. The 5th Circuit believes the mandamus action is nothing but a disguised form of requesting deportation order to be reconsidered. This is certainly untrue.

The Petitioner, in the above argument shows the 14th Amendment of U.S. Constitution clearly prohibits putting a class of citizen in suspect without due justification. When the law such as 245(i) did not clearly exclude a class of alien, the government must provide justification why the class of alien should be

distinctly excluded from the class who is qualified under 245(i). Neither the Service or lower courts have justified why an alien such as the Petitioner who was ordered to be deported, is different from the alien who is deportable, whether he entered illegally without inspection or remain here, passing the deadline. The alien should be given the benefit of the doubt when the law is not clear, especially when there is no clear justification to exclude the alien of an important benefit.

Having argued that the Petitioner is entitled to 245(i) benefit, and the fact that the Service has a duty to adjudicate the adjustment of status application, the undue delay is therefore subjected to court mandamus. "Mandamus relief is appropriate only when the person seeking such relief can show a duty owed to him by the government official to whom the writ is directed that is ministerial, clearly defined and peremptory." *Carpet, Linoleum and Resilient Tile Layers Local 419 v. Brown,* 656 F.2d 564, 566 (10th Cir.1981) (quoting *Schulke v. United States,* 544 F.2d 453, 455 (10th Cir. 1976)); *Wilbur v. United States,* 281 U.S. 206, 218-19, 74 L. Ed. 809, 50 S. Ct. 320 (1930). The APA further provides that the federal courts "shall . . . compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C. § 706(1). Thus, the APA gives rise to a legally enforceable right to the completion of administrative agency action within a reasonable time, not merely a right to have the agency take some action at all. *Id.; Deering Milliken, Inc. v. Johnston,* 295 F.2d 856, 861 (4th Cir. 1961).

More to the point, courts have specifically recognized jurisdiction under Section 1331 and the APA to hear challenges to INS delays in processing visa, LPR, and

citizen applications. *Zemin Hu v. Reno*, 2000 U.S. Dist. LEXIS 5030 (N.D. Tex., 2000) (jurisdiction was proper to compel the Immigration and Naturalization Service to adjudicate an application for adjustment to permanent resident status within a reasonable time; 2 ½ year delay); *Fraga v. Smith*, 607 F. Supp. 517, 520 (D. Or. 1985) (jurisdiction under APA for challenge to INS delay in processing citizen applications for foreign born citizens); *Sze v. INS*, 1997 U.S. Dist. LEXIS 10822, 1997 WL 446236, (N.D. Cal. 1997).

Courts addressing this question have held that the Immigration Service has a non-discretionary duty to process applications for LPR status as well as all other immigration applications. *See Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1182 (2nd Cir. 1977) (INS has duty to act on application for visa though no duty to complete an investigation into whether visa fraudulently procured); *Rahman v. McElroy*, 884 F. Supp. 782, 787 (S.D.N.Y. 1995) ("Defendants have a clear duty to interview the plaintiffs [applicants for LPR], but they do not have to schedule those interviews on any particular day or in any special sequence."); *Fraga*, 607 F. Supp. at 521 (INS required to process citizenship applications); *Agbemaple v. INS*, 1998 U.S. Dist. LEXIS 7953, 1998 WL 292441 *2 (N.D.Ill. 1998) (duty to process LPR application within reasonable time).

The Administrative Procedures Act imposes on the Immigration Service the duty to complete action on Petitioner's application within a reasonable time. *Forest Guardians*, 164 F.3d 1178; *Fraga*, 607 F. Supp. at 521 (APA requires INS to process citizenship applications within a reasonable time); *Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D.Cal. 1992); *Agbemaple*, 1998 U.S. Dist.

LEXIS 7953, 1998 WL 292441 *2; *Sze v. INS,* 1997 U.S. Dist. LEXIS 10822, 1997 WL 446236, *6-7.

As the Tenth Circuit recently stated,

if an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions--such as the APA's general admonition that agencies conclude matters presented to them 'within a reasonable time,' see 5 U.S.C. § 555(b)--a court must compel only action that is delayed unreasonably.

Forest Guardians, 164 F.3d at 1190

The Northern District of Illinois recently held in a similar case, although neither statute specifies a time by which an adjudication should be made, we believe that by necessary implication the adjudication must occur within a reasonable time. A contrary position would permit the INS to delay indefinitely. Congress could not have intended to authorize potentially indeterminable delays. We hold that as a matter of law, [the plaintiff] is entitled to a decision within a reasonable time, and that it is within the power of the court to order such adjudication. *Agbemaple v. INS,* 1998 U.S. Dist. LEXIS 7953, 1998 WL 292441. Thus, the Immigration Service owes Petitioner a non-discretionary duty to complete processing of his adjustment application in a reasonable time.

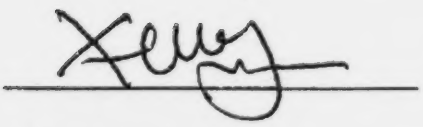
Finally, the Court must determine if Petitioner has a "clear and certain" right to mandamus or injunctive relief. This requires first that Petitioner had no other adequate remedy available to him, and second that Petitioner had established a *prima facie* case that the Immigration Service has violated the non-discretionary duty owed him. Petitioner has a clear and certain right to mandamus or injunctive relief. First, Petitioner has no other adequate

remedy available for the harm he seeks to redress. Second, Petitioner established *a prima facie* case that the Immigration Service approved the spousal petition, and now unreasonably delays in processing his adjustment application. On August 19, 1999, Petitioner filed an application to adjust his status under 245(i) grandfathered clause to that of a Lawful Permanent Resident. Petitioner established, and the Government did not disagree, that the usual processing time for Petitioner's application was about two years, but that his application had not been processed after more than six years. This is on its face an unreasonable amount of time to process a routine application and requires an explanation. *Emejula v. INS,* 989 F.2d 771, 772 n.1 (5th Cir., 1993).

On April 26, 1998, the Service and concurred by the 5th Circuit that Petitioner was granted voluntary departure under former INA § 244(e). As such, when an alien fails to depart under this provision, he is barred from applying for any relief including adjustment of status under 245(i) for five years under Immigration Act 1990 amendment § 242(e)(2). The prior version of this law (codified at 8 U.S.C. § 1229c(d)) applies to Petitioner because he was placed into deportation proceedings in 1996 and prior to the April 1, 1997, effective date of the current version of the voluntary departure law. According to a September 11, 1997, memorandum, signed by Paul W. Virtue, the INS' Executive Associate Commissioner for Programs, *(reproduced in Appendix "F" of the 75 NO 3 Interpreter Releases 79 dated January 16, 1998),* voluntary departure under the pre-IIRIRA law continues to be available for persons placed in proceedings before April 1, 1997. That law provides as follows: "the alien who remained in the United States after a grant of voluntary departure would,

other than for exceptional circumstances, be ineligible for discretionary forms of relief such as voluntary departure, suspension of deportation, adjustment of status, registry and change of nonimmigrant status for a period of five years after the scheduled date of departure or the date of unlawful reentry, respectively" Former INA § 242B(e)(2)(A). Petitioner was granted voluntary departure until April 26, 1998, which is his scheduled date of departure. From this date, the five-year penalty period expired on April 26, 2003. Thus, Petitioner is no longer statutorily barred from 245(i) relief.

Respectfully,



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APPENDIX A

Denial of extension for Voluntary Departure
from U.S. Department of Justice
Immigration and Naturalization Service
File: A-73-608-495
April 21, 1998

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action – Voluntary Departure
Please refer to this file number:
File A73608495
Date: April 21, 1998

To. (Enter full name and mailing address of alien)
LI, Guang Qui
43-10 65th Street #2
Woodside, NY 11377-5053

Please note: the blocks checked below relate to action taken in your case.

☐ You have violated the term of your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____

☑ In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before April 26, 1998.

☑ You request for an extension of time in which to depart from the United States has been Denied. You are required to depart on or before April 26, 1998.

☐ The amount of time that you have been granted to depart voluntarily is the maximum allowable under the law in your

situation. You are, therefore, prohibited from applying for or being granted any further voluntary departure.

☐ You request for voluntary departure has been denied since you were previously granted voluntary departure and failed to depart.

☐ You are ineligible for voluntary departure because you were previously permitted to depart voluntarily after you were found inadmissible as an alien who was present without having been admitted or paroled.

☐ You must notify this office on or before _____ of the arrangement you have made to effect your departure, including the date, place and manner. Use the enclosed self-addressed card to notify this office regarding departure arrangements. Postage is not required. At the time of your departure you must surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instruction on that form.

In consideration of the fact that the alien waived his application for suspension of deportation before the Immigration Judge on Aug. 25, 1997 his request for an extension of Voluntary departure, to pursue it at this time, is denied.

NOTICE: Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 an not more than $5,000, and render you ineligible for a period of 10

years for any further authorization for voluntary departure or for relief under section 240A, 245, 248, and 249 of the Immigration and Nationality Act.

If there is a bond outstanding in your case, you are warned that, to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

Sincerely,

/S/
Edward J. McElroy
District Director

APPENDIX B

Notice of Approval, Form I-797
Form U.S. Department of Justice
Immigration and Naturalization Service
Receipt No.: EAC-98-112-53687
January 27, 1999

Immigration and Naturalization Service
Notice of Action

The United States of America

Receipt Number: EAC-98-112-53687

Case Type: I-130 Immigration Petition for Relative, Finance(e), or Orphan

Receipt Date: March 5, 1998
Priority Date: March 5, 1998
Notice Date: January 27, 1999

Page: 1 of 1
s
Petitioner: A43 085 919 Li, Chui Fong
Beneficiary: A73 608 495 Li, Guang Qiu

Notice Type: Approval Notice
Section: Husband or Wife of permanent resident, 203(a)(2)(A) INA

The above petition has been approved. The petition indicates that the person for whom you are petitioning is in the United States and will apply for adjustment of status. The evidence indicates that he or she is not eligible to file an adjustment of status application. This determination is based on the information submitted with the petition and nay relating files. If the person for whom you are petitioning believes that he or she is eligible for adjustment of status, then he or she should contact the local INS office for more information.

Because the person for whom you are petitioning is not eligible to adjust, we have sent the approved petition to the Department of State National Visa Center (NVC), 32 Rochester Avenue, Portsmouth, NH 03801-2909. NVC processes all approved immigrant visa which consular post is the appropriate consulate to complete visa processing. NVC will then forward the approved petition to that consulate.

This completes all INS action on this petition. If you have any question about visa issuance, please contact the NVC directly. The telephone number to NVC is (603) 334-0700.

The NVC will communicate with the person for whom you are petitioning concerning further immigrant visa processing steps.

THIS FORM IS NOT A VISA NOR MY IT BE USED IN PLACE OF A VISA.

APPENDIX C

Denial of Motion to Reopen
From U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
A-73-608-495
September 17, 1999

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
LI, Guang Qiu
RESPONDENT/APPLICANT

Case No.: A 73 608495
Docket: New York, NY

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

☐ Motion to Reconsider an Immigration Judge's decision
☑ Motion to Reopen proceedings

Filed in the above entitled matter, it is HEREBY ORDERED that the motion

☐ be granted.
☑ be denied for the reasons indicated: the respondent has exceeded the numerical limitations for this kind of motion. 8CFR See. 3.23(b)(1). The motion, as was the prior motion, is also untimely. 8CFR See. 3.23(b)(1).

/S/
Immigration Judge

Date: September 17, 1999

APPENDIX D

Memorandum and Judgment
from U.S. District Court
for the Southern District of Texas
Laredo Division
Civil Action No. L-04-28
April 28, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

United States District Court
Southern District of Texas
FILED APR 27, 2004
Michael N. Milby, Clerk

United States District Court
Southern District of Texas
ENTERED APR 28, 2004
Michael N. Milby, Clerk
Laredo Division

GUANG QIU LI Petitioner	§	
v.	§	Civil Action No. L-04-28
CONRAD AGAGAN, Detention and Deportation Supervisor, United States Immigration and Customs Enforcement, Laredo, TX; GRACE WINFREY, Interim Field Operation Director, Detention and Removal Operations, United States Immigration and Customs Enforcement, San Antonio, TX; TOM RIDGE, Secretary of Homeland Security; JOHN ASHCROFT, U.S. Attorney General Respondents	§	

MEMORANDUM AND JUDGMENT

Pending before the Court are Petitioner's request for a writ of habeas corpus; Petitioner's request for declaratory relief; Petitioner's request for a preliminary injunction; and Petitioner's request for temporary restraining order.[1] Status conferences on these request were held on April 5, 2004, and April 13, 2004. For the reasons that follow, Petitioner's request for declaratory relief, Petitioner's request for a preliminary injunction, and Petitioner's request for a temporary restraining order are **DISMISSED FOR LACK OF JURISDICTION**. Reaching the merits of the habeas claim, Petitioner's request for a writ of habeas corpus is **DENIED**.

I. Factual and procedural History

The facts of this case, so far as they are discernable form Petitioner's filings, can be summarized as follows. Petitioner entered the United States, apparently illegally, on December 5, 1989, and applied for political asylum in 1996. He filed this application in New York, with unpaid legal assistance from New York attorney. For reasons unknown to Petitioner, his attorney withdrew the asylum application, and

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[1] The first of Petitioner's filing is formally titled Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief [Doc. 1] ("Request for Habeaus Writ and Injunctive Relief"). Petitioner's second filing is formally titled Application for Temporary Restraining Order Staying Deportation and for Release on Bail [Doc.2] ("Application for TRO and Bail").

Petitioner was granted until April 26, 1998, to depart voluntarily from the country.[2]

Prior to this voluntary departure date, Petitioner married Chui Fong Chan. Ms. Chan, then a permanent resident of the United States,[3] filed a Petition for Alien Relative on March 5, 1998.[4] The petition was approved on

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[2] The Court notes that Petitioner's factual allegations as to this initial proceeding are less than clear. Initially, the note that "[a] final order of deportation had been entered against Petitioner in immigration proceedings held in New York in 1997." Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Petition and Complain"), at 2, Later, however, he asserts that

> Sometime in 1996, petitioner filed an application for asylum, presumably in response to a Notice to Appear in Immigration Court in New York City, New York. However, his counsel withdrew petitioner's asylum application for reasons unknown at this time, and the court granted petitioner voluntary departure until April 26, 1998, with an alternative order of deportation.

Id. at 4. Although these allegations are not necessarily inconsistent, they do raise some questions as to the precise factual basis for Petitioner's claim. The Court notes that, in any future filings, Petitioner would be better served by a single, straightforward factual recitation at the beginning of a filing, rather than arguably inconsistent factual assertions scattered throughout his legal argument.

[3] Ms. Chan later became a U.S. citizen on November 8, 1998.

[4] Apparently in light of this petition, Petitioner requested an extension of his voluntary departure date. The United States Immigration and Customs Enforcement ("USICE") district director denied this request on April 21, 1998.

January 27, 1998. The approval of Ms. Chan's petition[5] made an immigrant visa available to Mr. Chan under 8 U.S.C. § 1153(a)(2)(A). It did not, however, guarantee that Mr. Chan would be allowed to adjust his status to obtain the benefit of that visa. *See* 8 U.S.C. § 1255 (setting limitation on adjustment of status even for those aliens for whom an immigrant visa is immediately available).[6]

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[5] Ms. Chan apparently used Petitioner's surname in her application, as the approval notice is directed to "Li, Chui Fong." However, as Petitioner refers to her as "Ms. Chan" in his pleadings, the Court will do the same.

[6] It is worth noting that the officer approving the application expressed doubts as to whether the approval would be sufficient to make Mr. Li eligible for adjustment of status;

> The petition indicates that the person for whom you are petitioning is in the United States and will apply for adjustment of status. The evidence indicates that he or she is not eligible to file an adjustment of status application. This determination is based on the information submitted with the petition and any relating files. If the person for whom you are petitioning believes that he or she is eligible for adjustment of status, then he or she should contact the local INS office for more information.
>
> Because the person for whom you are petitioning is not eligible to adjust, we have sent the approved petition to the Department of State National Visa Center (NCV)... [The notice becomes less legible here, but appears to continue as follows]. NVO processes all approved immigrant visa which consular post is the appropriate consulate to complete visa processing [sic]. NVO will then forward the approved petition to that consulate. [A final three to five lines of the notice are almost completely illegible.]

Petition and Complaint, Exhibit 2 ("Approval Notice").

Petitioner did not depart the United States prior to his April 26, 1998 voluntary departure date, thereby transforming the voluntary departure order into an order of deportation. On April 28, 1998, an immigration judge denied as untimely a request to reopen Petitioner's immigration proceedings which Petitioner has filed "sometime in 1997 or 1998 on grounds presently unknown to him or his counsel." Petition and Complaint, at 4. Neither Petitioner nor his present counsel know whether this order was appealed.

On June 30, 1999, petitioner filed an application to adjust his status on the basis of the January 27, 1998, notice approving Ms. Chen's alien relative petition. According to Petitioner, the government has not acted either to grant or deny this adjustment of status application.[7] Petition filed a second motion to reopen his deportation proceeding on July 22, 1999. The immigration court denied this motion on September 17, 1999.

United States Immigration and Customs Enforcement ("USICE") took Petitioner into custody on December 4, 2003, following an immigration sweep of one of the restaurants he owns in Odessa, Texas. Petitioner currently remains in USICE custody awaiting deportation. Petitioner filed a request for stay of deportation with USICE office in San Antonio, Texas on December 29, 1999. Respondent Grace Winfrey, a USICE officer, denied this application orally on February 9, 2003.

II. Petitioner's Claims

[7] Request for Habeas Writ and Injunctive Relief, at 2.

Petitioner presents three sets of claims. First, he asserts that his custody is in violation of the U.S. Constitution, and requests his release by writ of habeas corpus under 28 U.S.C. § 2241. Specifically, he asserts that respondents are "violating his constitutional rights because holding him without bond under these circumstances violates the Fifth and Fourteenth Amendments of the United States Constitution and contradicts the spirit of our nation's asylum law at [sic] it is expressed in 8 USCA Section 1158(b) and 1158(c)." Request for Habeas Writ and Injunctive Relief, at 7.[8]

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[8] Counsel also informs the Court that, after receiving documentation he has requested under the Freedom of Information Act, 5 U.S.C. § 552, there is a strong possibility Petitioner will want to assert a claim that prior counsel was ineffective. Specifically, counsel states the following:

> As an experienced practitioner of immigration law and procedure, my professional opinion is that nothing short of ineffective assistance of counsel explains Mr. Schneider's decision to withdraw petitioner's asylum application. Petitioner would not have filed an asylum application unless he was advised by Mr. Schneider that it was meritorious. He had nothing to gain by presenting a deficient application. He certainly would not have applied for asylum simply to bargain for extended time to voluntarily depart the United States, since his presence was previously unknown to the Service, and he could have otherwise left (or not left) any time be pleased. Bluntly, no logical reason exists to explain Mr. Schneider's action except ineffective assistance of counsel. However, out of respect for counsel and caution, I would like to investigate this further before presenting this to the court.

Application for TRO and Bail, Exhibit 1, Declaration of Xenos Yuen in Support of Temporary Relief ("Yuen Declaration").

Second, Petitioner asserts that, as the husband of a U.S. citizen, he is entitled pursuant to 8 U.S.C. § 1255(i) to adjustment of status to that of an alien lawfully admitted for permanent residence in the United States. He requests that the Court enter a declaratory judgment to this effect. Alternatively, he requests that the Court enter a declaratory judgment that (a) Petitioner is entitled to be released on bond pending a decision from USICE on his application of adjustment of status; (b) Petitioner is entitled to a stay of deportation while this application is pending; and (c) Petitioner is entitled to work in the United States while this application is pending.

Third, Petitioner request injunctive relief. Specifically, he requests that the Court order USICE to adjust Petitioner's status to that of a lawful permanent resident of the United States. Alternatively, he requests that the Court enter a preliminary injunction or a temporary restraining order (i) releasing Petitioner, with or without bond, form USICE custody; and (ii) staying Petitioner's deportation.

III. Jurisdiction

Petitioner asserts that this Court has jurisdiction under the habeas corpus statutes, 28 U.S.C. § 2241-2255, the general federal question statute, 28 U.S.C. § 1331, and the mandamus statute, 28 U.S.C. § 1361.

Section 2241(c)(1) permits this Court to issue writs of habeas corpus to individuals "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241. Neither the illegal Immigration Reform and Immigration Responsibility Act of 1996 nor the Anti-Terrorism and Effective Death Penalty Act of 1996 prevent courts from exercising § 2241 jurisdiction to grant petitions brought by

individuals held by USICE pending deportation. *See I.N.S. v. St. Cyr*, 533 U.S. 289,314 (2001). Accordingly, § 2241 provides this Court with jurisdiction over Petitioner's habeas corpus claim.

However, this Court does not have jurisdiction over Petitioner's other claims. The broad language[9] of § 1331 might, "standing alone, vest the district courts with jurisdiction" over Petitioner's claims under the Immigration and Nationality Act. *See K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988). However, this Court is "divested of jurisdiction" over any action falling "within one of several specific grants of exclusive jurisdiction" to another court. *See id.* at 182-83.

Judicial review of a final order of removal is one of those specific grants of exclusive jurisdiction, as review of these orders is vested exclusively in the U.S. Courts of Appeals. *See* 8 U.S.C. § 1525(a); 28 U.S.C. § 2342.[10] The Court cannot exercise § 1331 jurisdiction over any claim that would require the Court to review a final order of removal.

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[9] The Statute reads as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[10] Specifically, § 1252(a)(1) states:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, 3xcept as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

The April 26, 1998, final order of removal entered against Petitioner has not been vacated. The continuing validity of this order prevents the Court from exercising § 1331 jurisdiction in this case. Accordingly, the Court has no jurisdiction to issue a judgment declaring that Petitioner is entitled to adjustment of status or authorization to work in the United States.[11] Similarly, the Court has no jurisdiction to

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8 U.S.C. § 1252(a)(1). Accordingly, the general framework for review of a final order of removal is that set out in chapter 158 of title 28 (§§ 2341-2351 of that title). The jurisdictional provision of this chapter, § 2342 provides:

> The court of appeals (other than the Untied States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [various actions, including final orders, by certain specified federal agencies].

28 U.S.C. § 2342. Although § 2342 does not list USICE as one of the agencies to which it applies, a plain reading of § 1252(a) together with its surrounding provisions indicates that the exclusive jurisdiction provisions of § 2342, as modified by § 1252(b), are meant to govern judicial review of USICE final orders. *See* 18 U.S.C. §§ 1252(b)(2), 1252(b)(4)(A), 1252(b)(5)(all referring to review by the court of appeals). *See also* 18 U.S.C. § 1252(b)(4)(B)(referring to circumstances in which the court of appeals can transfer a proceeding to the district court for a new hearing on a nationality claim); 18 U.S.C. § 1252(b)(7)(referring to actions of a district court, but only in the context of a criminal proceeding under 28 U.S.C. § 1253(a)).

[11] The Declaratory Judgment Act; 28 U.S.C. §§ 2201-2202, is not an independent basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950). Accordingly, this Court may issue a declaratory judgment only when subject matter jurisdiction exists under some other statutory or constitutional provision. *See Id.*

issue a preliminary injunction ordering USICE to adjust Petitioner's status to that of a lawful permanent resident of the United States.[12]

Petitioner's final asserted ground for jurisdiction is the mandamus statue, 28 U.S.C. § 1361. Captioned "[a]ction to compel an officer of the United States to perform his duty," the statute provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.*

The Court is unable to find that Petitioner has made such a showing. The statutes on which Petitioner relies, 8 U.S.C. § 1158(b)-(c) and 8 U.S.C. § 1255(i), both speak of actions which involve the exercise of some degree of discretion on the part of the attorney general. See 8 U.S.C. § 1158(b)-(c) (the attorney general "may" grant asylum to an alien, but only if the attorney general first determines that the alien in question is a refugee within the meaning of another statute); 1255(i)(the attorney general "may" adjust the status of certain aliens physically present in the United States). Accordingly, § 1361 does not permit the Court to issue mandamus in this case.

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[12] Moreover, even if this Court could hear Petitioner's claims for declaratory and injunctive relief, it would be necessary to deny them as untimely. See 8 U.S.C. § 1252(b)(1) ("The petition for review must be filed no later than 30 days after the date of the final order of removal."). The order of removal became final after Petitioner overstayed his April 26, 1998 voluntary departure date. Petitioner's current claims, filed on February 27, 2004, are well beyond this 30-day period.

Petitioner's request for declaratory relief, Petitioner's request for a preliminary injunction, and Petitioner's request for a temporary restraining order are **DISMISSED FOR LACK OF JURISDICTION**. The Court will now consider the merits of Petitioner's request for habeas corpus.

IV. Merits of the Habeas Corpus Claim

Petitioner's habeas corpus claim rests on the assertion that he is being held in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. Request for Habeas Writ and Injunctive Relief, at 7. Additionally, he asserts that his detention without bond "contradicts the spirit of our nation's asylum law at [sic] it is expressed in 8 USCA Section 1158(b) and 1158(c)." *Id.*

As a preliminary matter, the Court notes that Petitioner has no claim under the Due Process Clause of the Fourteenth Amendment.[13] This clause, which constrains action by officials of the several states, does not apply to the federal government. *Rutherford v. United States*, 702 F.2d 580, 582 n.4 (5th Cir. 1983). Instead, "[t]he analogous limitations on federal action are embodied in the Fifth Amendment." *Id.* As Petitioner does not allege any violation of his due process rights by state officials, the Court finds no violation of the Fourteenth Amendment.

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[13] This Clause provides that "[n]o state shall...deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. § 1.

Petitioner also fails to state a claim under the Fifth Amendment Due Process Clause.[14] Although this is the proper clause under which to bring a due process claim against the federal government, Petitioner fails to allege sufficient facts to suggest an actual violation of his due process rights.[15]

In regard to Petitioner's claim that his detention contradicts spirit of 8 U.S.C. § 1158(b)-(c), the Court does not agree. Section 1158(b) sets forth the conditions for granting asylum, and prevents the attorney general from granting asylum to aliens who fail to fulfill these conditions. Section 1158(c) sets forth the implications of asylum status, the conditions that can result in a termination of asylum status, and the removal consequences that result from such a termination. After examining these statutory provisions, the Court fails to see how Petitioner's detention contradicts whatever spirit of our nation's asylum law these provisions may represent. As Petitioner cites no case law that might

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[14] This clause provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

[15] The failure of USICE to rule on Petitioner's application for adjustment of status is not sufficient in this regard, as 8 U.S.C. § 1229c(d) prevents Petitioner from qualifying for adjustment of status under § 1255, See 8 U.S.C. § 1229c(d) ("If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.")(emphasis added).

convince the Court to read these provisions more broadly, the Court is unable to find that Petitioner's detention violates the spirit of our nation's asylum law.[16]

Petitioner's request for habeas corpus is DENIED.[17]

V. Conclusion

Petitioner's request for declaratory relief, Petitioner's request for preliminary injunction, and Petitioner's request for a temporary restraining order are DISMISSED FOR LACK OF JURISDICTION. Petitioner's request for habeas corpus is DENIED on the merits.

IT IS SO ORDERED.
SIGNED this 27th day of April, 2004.

/S/
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS NOTICE SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT

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[16] Accordingly, it is not necessary to address whether § 2241 would in fact provide any remedy for such a violation.

[17] As Petitioner has not definitively asserted that prior counsel was ineffective, *see supra* note 8, it is not necessary for the Court to consider whether it is appropriate to grant habeas corpus on that ground.

APPENDIX E

5th Circuit Court Judge Order
from U.S. Court of Appeals for the 5th Circuit
No. 04-40705
March 14, 2006

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-40705

GUANG QIU LI,

Petitioner-Appellant,

Versus

CONRAD AGAGAN, ET AL.,

Respondents-Appellant,

Appeal from the United States District Court
For the Southern District of Texas
USDC No. 5:04-CV-28

Before JONES, Chief Judge, and WIENER and PRADO, Circuit Judges. PER CURIAM[1]

Petitioner Guang Qiu Li appeals the district court's dismissal of his petition for writ of habeas corpus and his requests for injunctive relief and mandamus. Because we find that the district court lacked jurisdiction to hear any of Appellant's claims, we VACATE and DISMISS.

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[1] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

I. Background

In 1989, Li, a native and citizen of the People's Republic of China entered the United States. Although Appellant applied for political asylum in 1996, because the application was withdrawn, the Immigration Court allowed him to depart voluntarily before April 26, 1998.

On January 15, 1998, Appellant married Chui Fong Chan, a permanent resident of the United States, who became a citizen in November 1998. On March 5, 1998 Chan filed a Petition for Alien Relative. In light of this petition, Appellant requested an extension of his voluntary departure date. The Immigration and Customs Enforcement ("ICE") District Director denied his request.

Because Appellant failed to depart the United States prior to April 26, 1998, his voluntary departure order was transformed into an order of deportation. On April 28, an Immigration Judge ("IJ") denied as untimely Appellant's request to reopen his immigration proceedings.

After Chan's Petition for Alien Relative was approved, Appellant filed an application to adjust his status to that of a lawful permanent resident on June 30, 1999, an IJ denied Appellant's second motion to reopen his immigration proceedings.

In December 2003, ICE took Appellant into custody. Appellant requested a stay of deportation which was denied by an ICE officer on February 4, 1999. Appellant remains in ICE custody and has not been deported because he is currently awaiting a travel document.

In the district court, Appellant sought to enjoin his deportation until his attorney could obtain a response to his Freedom Of Information Act request to complete an investigation into the effectiveness of the lawyer who

handled his 1996 asylum petition. Appellant also sought release from detention and work authorization while his claims were pending. Finally Appellant asked the court to either adjudicate his application for adjustment or to order the Department of Homeland Security (formerly the INS) to adjust his status.

While Appellant asserted that the district court had jurisdiction to consider his claims under the habeas corpus statutes, 28 U.S.C. §§ 2241-2255, the general federal question statute, 28 U.S.C. § 1331, the mandamus statute, 28 U.S.C § 1361, and the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the court found that it only had jurisdiction to consider Appellant's petition for writ of habeas corpus. Addressing the merits of that claim, the court denied the petition. This appeal followed.

II. Standard of Review

Whether a district court has subject matter jurisdiction to hear a case is a question of law that we review de novo. Grandy Nursery, Inc. v. United States, 318 F. 3d 631, 636 (5th Cir. 2003).

III. Discussion

Appellant submits two arguments: (1) the district court had jurisdiction to consider his petition for writ of habeas corpus, and should have granted the writ; and (2) the district court had jurisdiction to address his request for mandamus or affirmative injunctive relief to order the Department to adjudicate his application for adjustment of status. We will address each claim in turn.

A. Writ of Habeas Corpus

With regard to his petition for writ of habeas corpus, Appellant asserts that being held without bond violates the Due Process clause of the Fifth Amendment because the INS has not adjudicated his application for adjustment of status.

Additionally, in light of the possibility that his previous counsel might have been ineffective, he challenges the legality of the deportation order against him. Appellees contend that the court's jurisdiction was precluded on three separate grounds: (1) 8 U.S.C § 1252 (g) precludes jurisdiction because Appellant was actually seeking review of the decision to execute a removal order; (2) habeas review is unavailable because Appellant has an adequate remedy by petition for review in this Court; and (3) review of discretionary decisions in deportation proceedings is outside of the scope of habeas review. The district court, however, based its jurisdiction to consider Appellant's petition for writ of habeas corpus on 28 U.S.C. § 2241 (c)(1), which permits courts to issue writs to prisoners "in custody under or by color of the authority of the United States."

Congress and the courts have devoted much attention to the extent of jurisdiction in immigration cases. In October 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), 110 Stat. 3009-546 (1996), which substantially limits judicial review of the Attorney General's immigration decisions. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999) ("[M] any provisions of the IIRIA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation."). Title 8 U.S.C. § 1252 (g), which serves as a starting point for our inquiry into jurisdiction in this case reads:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence

> proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252 (g).[2] In Reno, the Supreme Court explained that § 1252 (g) was not a general bar on jurisdiction, but rather limited judicial review to a narrow class of discretionary executive decrees, decisions or actions to commence proceedings, adjudicate cases, or execute removal orders.[3] 525 U.S. at 483 (1999). The Court opined that the provision was included "to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *Id.* at 485.

The process for obtaining an adjustment of status is delineated in the Code of Federal Regulations. The Code of Federal Regulations provides that an alien who is in deportation or removal proceedings shall have his application for adjustment of status considered only in those proceedings.

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[2] This provision became effective on April1, 1997 and "appl[ies] without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." IIRIRA § 306 (c)(1); 8 U.S.C. § 1252.

[3] Because the IIRIRA changed the language of immigration orders, orders of deportation and orders of exclusion are both now referred to as "orders of removal." See IIRIRA § 309(d)(2), 110 Stat. 3009 (1996) ("[A]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation."). Therefore, we use the words "removal" and "deportation" interchangeably.

8 C.F.R. § 245.2(a)(1). Moreover, "[t]he [Legal Immigration and Family Equity] LIFE Act Amendments contain no special provisions for reopening cases under Section 245(i) of the Act (8 U.S.C. 1255(i)) where an alien already is the subject of a final order of removal, deportation or exclusion." 66 F.R. 16383 at 16386. Hence, motions to reopen based on Section 245(i) are governed by the Department of Justice's rules which contain time and numerical limitations on the filing of such motions. *See* 8 C.F.R. §§ 3.23(b)(1) and 3.2(c)(2)(now codified at 8 C.F.R. §§ 1003.23 and 1003.2).

Appellees cite *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000), to buttress their argument that § 1252(g) stripped the district court of jurisdiction over Appellant's habeas claim. In *Cardoso*, we affirmed the district court's application of § 1252(g) to dismiss alien's requests to compel the Attorney General to adjust their immigration status, permit them to remain in the United States, and provide them with work authorization. *Id.* at 513. We found that regardless of how the plaintiffs characterized their claims, they were seeking to prevent the Attorney General from executing orders or removal. *Id.* at 516. We recognized that, although their prayers might have been different, the plaintiff's claims were, in essence, an attempt to compel the Attorney General to allow them to remain in the country. *Id.* Therefore, this Court reasoned that if the plaintiffs had been successful, permitting "such challenges would 'lead to the deconstruction, fragmentation, and hence prolongation of removal proceedings at which the Supreme Court concluded that § 1252(g) is directed.'" *Id.* (quoting *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999).

We find Appellant's situation analogous to the circumstances of the plaintiffs in *Cardoso* notwithstanding the fact that the plaintiffs in *Cardoso* had all been denied

adjustments of status, and Appellant's application has never been adjudicated. Appellant essentially seeks review of the decision to execute a removal order against him, a request which § 1252(g) precludes the court from exercising jurisdiction. Because Appellant had a final order of deportation, his only avenue for adjustment of status was by reopening his proceedings. Appellant's adjustment of status has not been adjudicated because Immigration Judge have denied two of this motions to reopen. In other words, there is a process for adjusting the status of an alien in Appellant's position. Because Appellant has been unsuccessful at reopening his deportation proceedings, the April 26, 1998 order of removal entered against Appellant has not been vacated. By confining Appellant until a travel document for his deportation arrives, the agency is executing a valid removal order. Even if Appellant couches his claim as a request for adjustment of status, he is actually seeking review of the decision to execute a removal order against him. Hence, 8 U.S.C. § 1252(g) precludes jurisdiction.

Assuming arguendo that 8 U.S.C. § 1252(g) did not preclude the district court from exercising jurisdiction, habeas jurisdiction does not extend to review of discretionary matters like the one at issue here. "The decision to grant or deny a motion to reopen is purely discretionary." *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550 (5th Cir. 2006); 8 C.F.R. § 1003.23(b)(1)(iv). We have acknowledged that federal habeas jurisdiction does not extend to review of discretionary determinations made by agencies. *See, e.g.*, *Bravo v. Ashcroft*, 341 F.3d 590, 592-93 (5th Cir. 2003). Hence, because Appellant's petition depends on relief within the agency's discretion, and because jurisdiction is precluded by § 1252(g), the district court lacked jurisdiction over

habeas claims.[4]

B. Writ of Mandamus

Appellant also asserts that the district court erred by not addressing his request for mandamus or affirmative injunctive relief to order the INS to adjudicate his application for adjustment of status. Appellant argues that this is a case of unreasonable delay, and that the agency should be forced to adjudicate his claim for adjustment. The district court found that it lacked jurisdiction to issue an affirmative injunction or a writ of mandamus ordering the agency to adjust Appellant's status.

The test for whether jurisdiction lies pursuant to the Mandamus Act, 28 U.S.C. § 1361, is "whether mandamus would be an appropriate means of relief." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). "Three elements must exist before mandamus can issue: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available." *Id.*

Taking Appellant's allegations at face value, we find that the district court lacked jurisdiction over appellant's request for writ of mandamus. As with Appellant's habeas claim, because Appellant had a final order of deportation, and although Appellant characterized his claim as a request for adjustment of status, he is actually seeking review of the decision to execute a removal order against him. Hence, 8 U.S.C. § 1252(g) precludes jurisdiction.

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[4] We also note that aliens should seek review of deportation orders in this Court. "[F]ailure to pursue [direct review] before filing [a] habeas petition in the district court" will trigger denial on jurisdictional grounds. *Salazar-Regino v. Trominski*, 415 F. 3d 436, 445 (5th Cir. 2005)

Assuming arguendo that 8 U.S.C. § 1252(g) did not strip the district court of jurisdiction, Appellant failed to establish a clear, nondiscretionary duty owed by the agency, a requirement for exercising jurisdiction pursuant to the mandamus statute, 28 U.S.C. § 1361. Although Appellant attempts to frame his request as an action against the agency for unreasonable delay, 8 C.F.R. § 245.2(a)(1) provides that an alien who is in deportation or removal proceedings shall have his application for adjustment of status considered only in those proceedings. Appellant's only avenue for relief is through a motion to reopen. As discussed above, this type of relief is discretionary. Therefore, a writ of mandamus should not issue because Appellees did not owe Appellant a clear, nondiscretionary duty. *See Dunn-McCambell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997)(holding that in order for mandamus to issue, the party seeking the writ had to demonstrate a "legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion."). [5]

IV. Conclusion

Because we find that the district court lacked jurisdiction to hear any of Appellant's claims, we VACATE and DISMISS.

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Fifth Circuit
FILED March 14, 2006
Charles R. Fulbruge III, Clerk

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[5] Additionally, we note that Appellant implicitly acknowledged the existence of another remedy, under section 706 of the Administrative Procedures Act. See 5 U.S.C. § 706(1). This, too, would foreclose mandamus jurisdiction which requires that the party seeking the writ has no other adequate remedy.